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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1996

Special School District No. 1,

Petitioner

v.

H.M.,

Respondent

On Petition for a Writ of Certiorari from
the Minnesota Court of Appeals

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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35 pp !

QUESTION PRESENTED

Respondent H.M. asserts that the question is not as stated by Petitioner Special School District No. 1 and should instead be phrased:

> Whether a school district may deny a due process hearing requested pursuant to both Minnesota law and the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400, et seq., to a student whose parents were attempting to resolve the matter through a form of state preferred alternative dispute resolution when the student was *involuntarily* removed from his home and placed in a correctional facility in another district, where the child's parents never moved and where the child has, in fact, returned to his parents' home?

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Respondent H.M. respectfully requests that this Honorable Court deny Petitioner Special School District No. 1's Petition for Writ of Certiorari for the reasons and arguments set forth below.

JURISDICTION

Respondent H.M. respectfully asserts that this Honorable Court lacks jurisdiction to even entertain Petitioner Special School District No. 1's Petition for Certiorari because it is untimely. Rule 13 of the Rules of the Supreme Court of the United States requires petitions to be filed within 90 days from the entry of an order by the highest court of a state which denies discretionary review. In Minnesota that is the Supreme Court. Rule 13(3) states that "[t]he time to file a petition. . . runs from the *date of entry of the judgment or order* sought to be reviewed, and *not from the issuance date of the mandate*." (emphasis added.) Minnesota Rule of Civil Appellate Procedure 136.02 states that when a petition for review to the State Supreme Court is denied, the "[j]udgment shall be entered immediately upon the denial of [the] petition for review. . . ." In this case, the order of the State Supreme Court was denied and necessarily entered on July 10, 1996. (See A-76 of Petitioner's App. A-76.) Ninety (90) days from that date was October 8, 1996. This petition was not filed until October 9. The mandate of the court, that the case be remanded to a due process hearing, was entered September 10, 1996 and is located at A-77 of Petitioner's appendix. This Petition was not timely filed.

STATEMENT

Respondent H.M. is a disabled African-American student who appealed the refusal of Petitioner Special School District No. 1 (hereinafter, "Petitioner SSD 1") and the Minnesota Department of Education/Department of Children, Families, and Learning (hereinafter, "MDE/MDCFL")[1] to grant his parents an administrative hearing concerning past educational services. The agencies claim H.M.'s parents are not entitled to a hearing on past educational services because at the time his parents requested a hearing, H.M. was involuntarily incarcerated at the Department of Corrections in Red Wing (hereinafter, "DOC"). There is no dispute that at all times, H.M.'s parents have resided and continue to reside in the Petitioner District. The Minnesota State Court of Appeals ordered the agencies to provide Respondent H.M. a hearing. The Minnesota State Supreme Court denied a request for certiorari. Petitioner has now filed a petition seeking certiorari from this Court. A review of the facts show that the Court should not grant Petitioner's request for certiorari and the case should, instead, be allowed to proceed before an administrative agency. It is necessary for the Court to understand some of the basic facts in this matter to fully determine the legal issues.

Respondent H.M. is now 19 years old; he was 17 when this dispute began.[2] Respondent H.M. has been a special education student, with speech and language difficulties, learning disabilities and related emotional problems. Respondent H.M. moved to Petitioner SSD 1's school district with his family in late 1990 and began attending public school within the district.

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[1] The Minnesota Department of Education is now a part of the Minnesota Department of Children, Families and Learning.

[2] H.M. was born October 28, 1977. Minn. §120.17, Subd. 1.

While attending Petitioner SSD 1's schools, Respondent H.M. was placed on an Individual Education Plan or "IEP"[3]. There is no dispute that Respondent H.M. is disabled and has been in need of special education services. Almost immediately since arriving in Minneapolis and attending school, however, Respondent H.M.'s parents have had concerns about the kind and amount of special education services Respondent H.M. was receiving from Petitioner SSD 1. Respondent H.M.'s parents continued to seek help for Respondent H.M. but due to inappropriate services he slowly began to become less and less concerned with school.

In March of 1995, Respondent H.M. was placed by juvenile court order at Second Chance Ranch in the Anoka-Hennepin School District. As his parents were disputing the IEP created for him there, Respondent H.M. was transferred to the Hennepin County Juvenile Center in April, 1995. The Hennepin County Juvenile Center is located within the geographic school district boundaries of Petitioner SSD 1 and is not under the control of the DOC.

In April of 1995, while Respondent H.M. was still incarcerated at the Hennepin County Juvenile Facility, Respondent H.M.'s parents obtained counsel to assist in seeking services for their son at the Facility. On May 3, 1995, counsel sent a letter on Respondent H.M.'s behalf to the MDE/MDCFL, the DOC, and the Hennepin County Probation Department concerning Respondent H.M.'s educational services while he was incarcerated at the Hennepin County Juvenile Facility. Respondent H.M.'s counsel requested a form of alternative dispute resolution unique to this area of law and specifically encouraged by legislative mandate, known as a

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[3] An IEP is a document which explains what special education services are to be provided to a child receiving special education services and how and where. H.M. was receiving special education services in Chicago prior to coming to Minneapolis.

conciliation conference. Minn. Stat. §120.172[4], §120.17, Subd. 3b(c), Minn. R. 3525.3700.

The Petitioner SSD 1 responded, providing an IEP, but no conciliation conference was held. Respondent H.M.'s parents objected to the proposed IEP and again requested conciliation. Finally, on May 19, 1995, a conciliation conference was held in the offices of Petitioner SSD 1, with their counsel present and with their participation. However, by this time, H.M. had been involuntarily transferred to the DOC, to a facility in another town, known as the Red Wing Correctional Facility. No resolution was reached at the conference.

On June 7, 1995, Respondent H.M.'s parents, who continued to reside in SSD 1, requested a special education due process hearing pursuant to state and federal law.[5] Two other families also made the same kind of request. (See, Petitioner's App. A-88, Thompson v. Special School District No. 1; A-100, W.S. v. Special School District No. 1) Respondent H.M. directed his hearing request at both the Petitioner SSD 1 and the DOC. The MDE/MDCFL was also specifically made aware of the hearing requests. Due process was requested in an attempt to resolve both present issues at the DOC and past failures of the Petitioner SSD 1 to provide a free appropriate public education to H.M. by the Petitioner SSD 1 and DOC. A Hearing Officer (HO) was appointed by the MDE/MDCFL and subsequently bifurcated the hearings between the two

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[4] The statute provides: "The legislature finds that conciliation conferences pursuant to section 120.17 serve better than formal hearings to promote communications between parents and school staff and to reach prompt, shared decisions about educational programs for children with a disability. Further, the legislature urges the United States department of education and the United States office of civil rights to acknowledge that the conciliation conference process violates no federal statute or regulation. Minn. Stat. §120.172, Subd. 1

[5] Minnesota has a two tier process for administrative resolution of special education disputes involving first a local due process hearing and then a state review. See, generally, Schuldt v. Mankato, 18 IDELR 16, 937 F. 2d 1357, (8th Cir. 1991).

agencies. The Petitioner SSD 1 then moved the HO to dismiss it from the proceedings.

The HO delayed the decision on the Petitioner SSD 1's motion to dismiss pending a decision in W.S. v. Special School District No. 1, which was in the midst of a purported interlocutory appeal. The propriety of that appeal is presently a matter in U.S. Federal District Court, where claims of discrimination, violations of civil rights and conspiracy are pending. (Petitioner's App. A-101, n 3) The SSD 1 in W.S. had moved to dismiss asserting that the student was no longer a resident of the district nor was he attending school in the district. A state appointed Hearing Review Officer (HRO) denied the student's right to a hearing on past educational services because W.S. had voluntarily moved out of the district. The HRO dismissed W.S.'s case on August 4, 1995.

On August 15, 1995, over two months after Respondent H.M.'s parents had made their written request for a hearing, the HO, apparently in reliance on the W.S. decision, granted the Petitioner SSD 1's motion to dismiss.

Respondent H.M. appealed the HO's decision to a HRO appointed by the MDE/MDCFL as part of the required two level administrative process for special education hearings in Minnesota. See, generally, Minn. Stat. §120.17, Subd. 3b. On September 20, 1995, the HRO issued an Order affirming the HO's order dismissing Respondent H.M.'s hearing. The HRO also based her decision, in part, on W.S..

Thereafter, Respondent H.M.filed an appeal in the Minnesota State Court of Appeals. On May 14, 1996, the Minnesota State Court of Appeals reversed and remanded the matter for hearing. The Petitioner SSD 1 filed for writ of certiorari to the Minnesota Supreme Court, which was denied on July 10, 1996. (Petitioner's App. A-76). At no time did the Petitioner SSD 1

request a stay of the order of the Minnesota State Court of Appeals or the Minnesota Supreme Court as required by 28 U.S.C. §2102(f). The hearing was scheduled to begin October 21, 1996. On October 21, 1996, this Court denied the request for a stay of that proceeding. (Respondent's App. A-1) On October 17, 1996, the hearing officer who first dismissed H.M.'s hearing granted an additional extension of time to Petitioner SSD 1. (Respondent's App. A-2) The hearing, first requested on June 7, 1995, and remanded by the Minnesota State Court of Appeals on May 14, 1996, has not yet commenced.

REASONS TO DENY THE PETITION

I. The Minnesota Court of Appeals Ruled Correctly and the Supreme Court Lacks Jurisdiction.

The jurisdiction of this Court is limited when questions arise in state courts. The jurisdiction of this Court over questions arising in state courts is pronounced at 28 U.S.C. §1257. That section provides, in relevant part, that

> [f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari *where the validity of a* treaty or *statute of the United States is drawn into question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution*, treaties, *or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of*, or any commission held or authority exercised under, *the United States.*(Emphasis added.)

28 U.S.C. §1257(a). The Petitioner raises the request for certiorari specifically under the Individuals with Disabilities Education Act, (hereinafter, "IDEA") 20 U.S.C. §1400 et seq., a federal law, and has not claimed a state law to be at issue. Because the State Court of Appeals

made a decision based on state law, however, the validity of the IDEA itself is not in question. No "title, right, privilege, or immunity" is being "specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." There is no inconsistency between the IDEA and the decision of the Minnesota State Court of Appeals in this case. Thus, the Court lacks jurisdiction to grant certiorari.

A. The State Court of Appeals Decision is Consistent with the IDEA.

There is no inconsistency between the IDEA and the decision of the Minnesota State Court of Appeals in this matter. The Minnesota State Court of Appeals decision holds

> "[W]e believe that a hearing is necessary, and was necessary... to determine whether the district must compensate H.M. for a past denial of the education to which he is entitled."
>
> "Under Minnesota law, H. M. is entitled to a due process hearing to address his claims for compensatory education from the district."

In the Matter of H.M. vs. Special School District No. 1 and Commissioner of Children, Families and Learning, C7-95-2204 (Minn. App. May 14, 1996) (Petitioner's App.A-67, 68)

The relevant portion of the IDEA sets out Congress' mandate concerning a child's right to an administrative hearing:

> 20 U.S.C. §1415(b) Required procedures; hearing
> (1) The procedures required by this section shall include, *but shall not be limited to--*
> . . .
> (E) an opportunity to present complaints with respect to *any matter* relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.
> (2) Whenever a complaint has been received under paragraph (1)

> of this subsection, *the parents or guardian shall have an opportunity for an impartial due process hearing* which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, *as determined by State law* or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child. (Emphasis added.)

There is nothing in the IDEA which addresses the issue of residency or the jurisdiction of hearing officers. The IDEA thus *specifically* leaves the issue of what entity shall conduct a hearing to the States. The Minnesota Court of Appeals decision examined state law and is necessarily one of *state law*, not one of federal law construction, because it addresses the issue of what entity must provide a hearing based upon an interpretation of Minnesota law. The decision is not inconsistent with the IDEA. The question decided does not have an effect on federal law but rather interprets it within the authority granted to the states under that federal law. Therefore, the United States Supreme Court lacks jurisdiction under 28 U.S.C. §1257 and should not grant certiorari pursuant to Rule 10C of the Supreme Court Rules.

B. The State Court of Appeals Decision is Consistent with Federal Court Interpretations of the IDEA, Including MN Federal Courts

The Minnesota Court of Appeals did not clash with the Federal Courts when it issued its unpublished decision in H.M.[6] The thrust of the Petitioner's argument, that there is conflict between the State Court of Appeals and the Eighth Circuit, relies on a 14 year old case, Monahan v. State of Nebraska, 687 F.2d. 1164 (8th Cir. 1982). Not only is Monahan old law and

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[6] While it is true that the H.M. decision is published in the Individuals with Disabilities Education Law Reporter, Petitioner provides no evidence whatsoever that the H.M. decision is being cited as binding precedent.

inconsequential in the case at bar, but the facts are very different. Likewise, the recent Federal Circuit Court cases the Petitioner cites, Thompson v. Special Sch. Dist. No. 1, 3-95-1083 (D. Minn. Filed July 31, 1996) and Smith v. Special Sch. Dist. No. 1, 4-96-685 (D. Minn. Filed August 12, 1996), are factually distinct from H.M. and also contain unfounded conclusions of law.

Monahan is old law. It came several years before Miener v. Missouri, 800 F.2d. 749 (8th Cir. 1986) and other important decisions which make clear that Congress intended that students who have been deprived a free appropriate public education ("FAPE") are entitled to a remedy, albeit a limited one. *See* Florence County Sch. Dist. Four v. Carter, 114 S. Ct. 361, __ U.S.__ (1993), School Committee of Burlington v. Department of Educ., 471 U.S. 359, 105 S. Ct. 1996 (1985), Lester H. v. Gilhool, 916 F.2d 865 (3rd Cir. 1990), Burr v. Ambach, 863 F.2d 1071 (2nd Cir. 1988), vacated and remanded on other grounds *sub nom*, Sobol v. Burr, __ U.S. __, 109 S. Ct. 3209 (1989), reaff'd, 888 F.2d 258 (2nd Cir. 1989), *cert. denied*, __U.S. __, 110 S. Ct. 1298 (1990), Jefferson County Bd. of Educ. v. Breen, 853 F.2d 853 (11th Cir. 1988).

It is critical to the disposition of this case that the Court review the progeny of seminal cases on remedies under the IDEA. The Eighth Circuit, in Miener v. State of Missouri, 673 F.2d. 969 (8th Cir.), cert denied, 459 U.S. 909, 74 L.Ed.2d. 171, 103 S. Ct. 215 (1982) ("Miener I"), denied monetary damages to a disabled student, reasoning that Congress did not intend such a remedy under the IDEA. In 1985, however, this Court first affirmed the availability of a monetary remedy in Burlington, *supra*, holding that public schools could be ordered to pay tuition reimbursement to parents who placed their children in private schools, at their own expense, because they were not receiving a free appropriate public education in the public

school. Just one year later, in Miener v. State of Missouri, 800 F.2d 749 (8th Cir. 1986), "Miener II", the Eighth Circuit re-examined the issue in light of Burlington. The Court extended the Burlington theory to a second type of remedy, known as compensatory education, for children whose parents lacked deep pockets and who therefore could not be provided private schooling while their parents disputed public school programming. In Miener II, the parent contended that he did not have the money to pay for an appropriate form of education for his daughter during the time of the dispute, and thus had to place her in what he conceded was not an appropriate placement. The parent then sought to recover the educational services that the child should have received during a three-year period, services that the parent could not provide and that the defendant school district and state department were unwilling to provide. Miener II held that:

> We cannot agree with the defendants that they should escape liability for these services simply because Clyde Miener was unable to provide them in the first instance; we believe that such a result would be consistent neither with Burlington nor with congressional intent. Like the retroactive reimbursement in Burlington, imposing liability for compensatory educational services on the defendants "merely requires [them] to belatedly pay expenses that [they] should have paid all along," 105 S. Ct. At 2003. Here, as in Burlington, recovery is necessary to secure the child's right to a free appropriate public education. Id. We are confident that Congress did not intend the child's entitlement to a free education to turn upon her parent's ability to "front" its costs." Miener II, at 753.

The Lester H. court explained the Miener court's reasoning this way, "compensatory education, like tuition reimbursement, cures the deprivation of a handicapped child's statutory rights, *thus providing a remedy which Congress intended to make available.*" Lester H., 916 F.2d at ___ (3rd Cir. 1990), *citing*, Miener, 800 F.2d at 753 (8th Cir. 1986)(emphasis added).

The fact that H.M. was not in "attendance in the district should not be dispositive of this

issue [of when a district must follow the procedural requirements of the IDEA]." Evans v. Dist. No. 17 of Douglas Co., 841 F.2d 824, 829 (8th Cir. 1988). In Evans the Eighth Circuit Court of Appeals stated that a child in a private placement was still entitled to due process protection under the IDEA pursuant to 34 C.F.R. §300.403(b). H.M.'s situation was more similar to that of a child placed in a private school than to one who voluntarily moved out of the District as was the case in Monahan. Because H.M. was only temporarily out of the district, and his parents remained there, he is entitled to the due process protections of the IDEA just as a child in private placement would be.

The Petitioner argues that recent Federal Circuit Court cases in Minnesota display an inconsistency between the decision in H.M. and the Federal Courts. The fact is, the cases cited by the Petitioner, Thompson, 3-95-1083 (D. Minn. Filed July 31, 1996) and Smith, 4-96-685 (D. Minn. Filed August 12, 1996) are not at all similar to the facts in H.M. H.M. was a student who lived with his family within the Petitioner school district at all times except when he was involuntarily placed in juvenile correctional facilities. In Smith, the student's family had voluntarily moved to another school district. This fact alone marks a clear distinction between the cases because H.M.'s family never moved. Additionally, H.M. is again living with his family in the district, and Petitioner is, without question, responsible for providing him a FAPE and due process.

While Thompson contains a different factual scenario than H.M., its distinction rests more on legal grounds. The court in Thompson focused on the fact that the student was seeking "damages." "Courts have recognized that a claim for compensatory educational services is available to remedy the denial of FAPE." Thompson, 3-95-1083 (D. Minn. Filed July 31,

1996)(A-89), *citing* Burlington, 471 U.S. 359, 369 (1985) and Miener, 800 F.2d 749 (8th Cir. 1986). The court stated, however, that there was no basis for an award of damages for a denial of FAPE. Id. (A-90). The court goes on to mention "educational malpractice" and that there is no such claim. Id. However, the Court never fully explained whether its tenuously supported theory of "educational malpractice" prohibited a claim for compensatory education as well as damages. It is clear, however, that compensatory education, like tuition reimbursement, is not a "damage" award to a claim of "educational malpractice" but is a remedy to a failure to provide a FAPE, something the District was required to provide all along. *See* Burlington, 471 U.S. at 370-71, (1985); Miener, 800 F.2d at 753 (8th Cir. 1986) . The court in Thompson steered clear of directly contradicting the Eighth Circuit and this Court and did not specifically say that there can be no claim for compensatory education, regardless of where the child is currently attending school.

The Thompson court actually supports H.M.'s claim for compensatory education (and necessarily a right to hearing) in its discussion about the procedural safeguards provided at 20 U.S.C. §1415(b), Thompson, (A-90, 91). While the Thompson court rejected the right of a student to bring an action for damages against a former school district, it supported a claim for the remedy of compensatory education. The court adopted language from the Seventh Circuit case of Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981): "a parent could bring any matter 'concerning the educational situation of his child. . . in order to obtain *the appropriate educational placement*.'" Thompson, *citing* Anderson, 658 F.2d at 1211. H.M. requested a hearing to challenge the services he had been receiving (or lack thereof) from the Minneapolis School District. It is immaterial that he was temporarily placed outside of the District by another

agency. His family remained there and he was destined to, and in fact did, return to school there. This scenario very closely resembles one in which a child is placed in a private placement by her parents but still has due process rights with respect to the district the child had attended prior to the private placement. Even more compelling is the fact that H.M. was most definitely likely to return to the District, and did, upon being released from the correctional facility. A child in a private placement is conceivably less likely to return because they have voluntarily left. The Minnesota Court of Appeals recognized these differences and issued its unpublished decision granting H.M. a hearing. The decision was, as the court recognized, very factually distinct and in no way contradicts any valid federal court interpretations of the IDEA. Therefore there is no basis for Supreme Court review.

II. The Supreme Court Should Not Intrude on Minnesota's Interpretation of State Law.

The Supreme Court should not review this case because it is ultimately a question of state law interpretation. The IDEA is specific on minimal due process requirements and leaves the rest to the states. 20 U.S.C. §1415(b)(2). At question are state law provisions for alternative dispute resolution, limits on issues that can be heard in a due process hearing, and state residency issues.

A. Minnesota's ADR System Must Be Interpreted Consistently with the IDEA.

The Petitioner knew that H.M.'s parents were dissatisfied with the services their son was receiving long before he went to Red Wing. In fact, the parents had already requested a conciliation conference in May, 1995 to attempt to resolve the dispute with the district amicably and consistently with Minnesota's ADR process. H.M. was in Minneapolis at a county detention

center where the Petitioner had the responsibility, under state law, to provide a FAPE at that time. The Petitioner delayed a request to conciliate and thus, by the time H.M. demanded a hearing, he had been involuntarily moved to Red Wing.

Congress stated the purpose of the IDEA is to

> assure that all children with disabilities have available to them, within the time periods specified in Sec. 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities *and* their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities. (Emphasis added.)

20 U.S.C. §1400(c). The United States Department of Education, Office of Special Education Programs, has referenced the appropriateness of alternative dispute resolution in these kinds of cases. 34 C.F.R. §300.506 contains the following notation:

> Note: Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification, evaluation, and educational placement of children with disabilities, and the provision of FAPE to those children. Mediations have been conducted by members of SEA or LEA personnel who were not previously involved in the particular case. *In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights under Secs. 300.500-300.515.* (Emphasis added.)

Minnesota's preference for alternative dispute resolution is supported by this legislation because it is often quicker, cheaper and ultimately in the best interests of the children when resolving disputes over FAPE. If H.M. will not be provided a hearing because he was *involuntarily*

removed temporarily from the District while he was attempting to resolve his dispute through conciliation, then the purpose of both state and federal law is thwarted. Students and their parents should be rewarded, not penalized, for attempting to resolve disputes through alternative dispute resolution. To permit this district to deny a hearing by claiming that it was no longer responsible for H.M.'s education by virtue of the fact that he was involuntarily moved out of the district while he was attempting to conciliate the matter is not a result intended by Congress.

Nor is this result consistent with Minnesota state law. Minnesota state law provides for alternative dispute resolution when questions about the provision of FAPE arise between parents and school districts. Minn. Stat. §120.17 Subd. 3b(c) clearly states that:

> "...[p]arents and guardians shall have an opportunity to meet with appropriate district staff in at least one conciliation conference, mediation, or other method of dispute resolution. . . . The conciliation process or other form of alternative dispute resolution shall not be used to deny or delay a parent or guardian's right to a due process hearing."

The Minnesota legislature has affirmatively endorsed this mechanism of alternative dispute resolution, providing that:

> "**Subd. 1. Policy statement**. The legislature finds that *conciliation conferences pursuant to section 120.17 serve better than formal hearings* to promote communications between parents and school staff and to reach prompt, shared decisions about educational programs for children with a disability. Further, the legislature urges the United States department of education and the United States office of civil rights to acknowledge that the conciliation conference process violates no federal statute or regulation.
>
> ***Subd.2. State plan***. The state board of education shall not adopt any provision in the state plan for special education which reduces the opportunity for parents and school districts to resolve their differences through conciliation. Minn. Stat. §120.172. (Emphasis added.)

The Court should reject any argument of Petitioner that H.M. and his parents are not and were

not entitled to bring issues to a formal due process hearing, just because while he was attempting to utilize the legislatively preferred conciliation conference process, he was involuntarily moved out of SSD 1.

B. A Request for Compensatory Education is a Hearable Issue Under Both Minnesota and Federal Law.

The H.M. decision is consistent with state law because the request for due process was based on a request for compensatory education which is a proposed provision of services that have been denied. Minn. Stat. §120.17 Subd. 3b(e) states that a due process hearing will be provided when a parent objects to "the proposed denial or removal of special education services for their child." Minn. Stat. §120.17 Subd. 3b(e)(5). H.M.'s parent sought additional special education services for him in the form of compensatory education. The District has yet to agree to this and so there is a "denial" of certain special education services. The Minnesota Court of Appeals rejected "the distinction between "proposed" and "retroactive" services in the context of compensatory education." H.M. (A-67). The Court explained that a claim for compensatory education could be construed as a proposed action because the student is seeking services to be provided in the future. Id. This is sound and logical reasoning. Minn. Stat. §120.17 may, in fact, violate the IDEA by unduly limiting what issues may be brought to a due process hearing. The Minnesota Court of Appeals surely considered this and ruled accordingly by interpreting the state statute in a way that conformed with the federal law. In any event, the Minnesota State Court of Appeals decision is again essentially an interpretation of state law and thus is not a basis for United States Supreme Court review.

C. Residency Is Clearly a Question of State Law.

The issue of residency and what agency or entity must provide a due process hearing is solely a question of state law. The IDEA, as mentioned, specifically leaves this to the states.[7] 20 U.S.C. §1415(b)(2). Disputes about the interpretation of state law are best left to the purview of the state courts. Specifically, the chief question upon which the petition is based is whether or not H.M. was a resident or otherwise entitled to a due process hearing from the District at the time of the request for same. The IDEA does not address this so it is left to the states. In Minnesota there is a genuine question about state law construction on this point. For example, Minnesota Rule 3525.2325, Subp. 1(D) provides that the Minnesota Department of Corrections is the school district for students placed in that agency's care. The extent of that authority is in question, however. The District has argued that since the Department of Corrections (DOC) is "the district" it is responsible for all due process procedures, including hearings, for special education students placed with it. Minnesota Statute is not entirely clear on this point, however, and it is questionable that Petitioner can escape all responsibility for due process for its students placed with the DOC. Minn. Stat. §120.17 Subd. 7 provides:

> Responsibility for special instruction and services for a child with a disability placed in a state institution on a temporary basis shall be determined in the following manner:
>
> (a) The legal residence of such child shall be the school district in which the child's parent resides, . . .

---

[7] Catlin v. Sobol, 93 F.3d 1112, 24 IDELR 767, (Second Cir. 1996), [previously reported at 17 EHLR 686, and 22 IDELR 691] after receiving interpretation of state courts, holding that New York residency statute did not violate the IDEA, because under the statute there was a presumption that the district of the parent's actual residence remained responsible for the child's education, regardless of where the child actually lived, absent parental abandonment.

There is no statutory authority for Petitioner's contention that it was not the responsible district at all times, even while H.M. was in the DOC facility at Red Wing. DOC may have been responsible for providing the instruction but Petitioner was responsible for assuring a FAPE was provided and that due process procedures were followed. In Minnesota, according to state special education law, more than one district can be involved in a child's educational life. As the Court of Appeals correctly explained, citing Minn. Stat. Sec. 120.17, Subd. 6a:

> Finally, we note that the legislature has named the individuals and entities that may be parties to a due process hearing. Those parties include "[t]he child's school district of residence, a resident district and providing district ***"Id., subd. 6a. "School district of residence" is defined as "the district in which the child's parent resides**** *Id.*, Subd. 6 (a). During H.M.'s placement at Red Wing, his parents continued to reside in the district. (Petitioner's App. A-68.)

This statutory scheme is consistent with standard residency theory. For example, in determining domicile for tax purposes the court must look at where the individual resides in fact as well as the individual's intention of making that residence a home. Texas v. Florida, 306 U.S. 398, 424 (1939). H.M. did not lose his residency in Minneapolis simply because he was temporarily and *involuntarily* removed to a correctional facility in Red Wing. There is no basis for Petitioner's long standing argument that it was relieved of its duty to H.M. during that period. Most important for this Court, however, is that this question remains one with which Minnesota and Minnesota alone must grapple. It is not a basis upon which certiorari can or should be granted.

Parents and students must be able to bring hearings against all involved entities. The Petitioner asserts that the purpose of the IDEA would be violated if more than one school district is joined to a due process hearing. Borrowing the theory of joint and several liability from tort

law, Petitioner may be held accountable for its failures even if the DOC was responsible for the provision of services during the time H.M. was *involuntarily* incarcerated. Under Minnesota tort law, all defendants who are potentially liable may be joined procedurally as defendants in a plaintiff's claim. Kleidon v. Glascock, 10 N.W.2d 394 (Minn. 1943). Even in cases where the acts of multiple tortfeasors were successive in time they may be held jointly and severally liable. Tolbert v. Gerber Indus. Inc., 255 N.W.2d 362 (Minn. 1977). The reason for this is to assure that a full recovery is made, whether it is apportioned or is provided entirely by one of the defendants. So likewise, when a school district is alleged to have denied a student FAPE, but is no longer responsible for the provision of FAPE, it may be necessary to join that district in a due process action. If it is not joined, the current district may be asked to show that another district provided the child a FAPE, an obviously absurd proposition. If the student were limited to only asking whether the current district has provided FAPE, the purpose of the IDEA would be thwarted. The current district may show that it has provided FAPE and so no award of compensatory education would be warranted. However, the student may have suffered genuine harm in being denied FAPE by the former district but is precluded at that point from receiving a remedy to that harm. This is not a result Congress intended because it fails to hold districts accountable for their duties under the IDEA and allows disabled children to slip through the cracks and not receive the FAPE they are entitled to and should receive. Therefore, if the theory of joint and several liability is employed, the purpose of the IDEA is met.

Various courts have permitted more than one entity, whether it be a state educational agency or a local educational agency, to be joined as a party to this type of litigation. In Doe by Gonzales v. Maher, 793 F.2d. 470, 1492 (9th Cir. 1986), *aff'd as modified on other grounds*, 485

U.S. 305 (1988), the Ninth Circuit established a three-prong test to determine when a state educational agency, in addition to a school district, may be a party to litigation involving a special education student. See also, Moubry v. ISD 696 and Minnesota Department of Education, No Parallel Citation, 24 IDELR 119 (D. Ct.MN 1996) (holding that state agency could bear ultimate responsibility if local educational agency failed student); Hill v. Laurel, No Parallel Citation, 22 IDELR 489 (S.D. Mississippi 1995) (finding that state agency could be implicated depending on factual determinations concerning local educational agency.) At least one court has considered who must be a party to an administrative hearing and concluded that there can, indeed, be more than one entity responsible for the child's education. In Randolph Union High School Dist. No. 2 v. Byard, No Parallel Citation, 22 IDELR 617 (D. Vt. 1995), the Court was asked whether the student had failed to exhaust administrative remedies by not naming individual teachers as "parties" at the administrative hearing level; in answering the question, the Court correctly noted that:

> In determining who must be a party to an administrative proceeding, the Court should look to the purpose and effect of the proceeding and the particular statute under which it is brought. See, e.g., Whitehouse v. Illinois C.R. Co., 349 U.S. 366, 370 (1955). The purpose of an IDEA administrative hearing is to ensure that children with disabilities receive an appropriate education. 34 C.F.R. § 300.1. *Because each State is responsible for providing a FAPE to its children, all political subdivisions of the State that are involved in the education of children with disabilities are subject to the IDEA. 34 C.F.R. § 300.2. Therefore, state educational agencies ("SEA"), local educational agencies ("LEA"), and intermediate educational units ("IEU") are appropriate parties to an IDEA administrative hearing. 20 U.S.C. § 1415(a).*

See, also, Unified School District No. 1, 22 IDELR 600, (SEA CT 1995), (recognizing need for due process hearing against both home district and district of incarceration of pretrial detainee.)

In this instance, the purpose and effect of the proceeding requested in June of 1995 was

to resolve H.M.'s current educational services at the time, and to determine whether he was entitled to prior services for the failures of SSD 1. Obviously, it would have been more efficient to have a joint hearing, with both entities and to resolve both past and current services at a time more recent to the dispute. That did not occur because the hearing officer dismissed the case as to SSD 1 and the litigation leading to this request for certiorari followed. That was short-sighted. As the state hearing officer in Loudon County Pub. Schs., 22 IDELR 833 (SEA Virginia 1995) found, jurisdiction continues over the district initially involved even when the student voluntarily transferred to a different school district than was the subject of the proceeding because the father maintained a residence in the original district. In Loudon, as the administrative hearing officers should have done here, the hearing officer recognized that there was a likelihood that the child might re-enroll, making the issue capable of repetition. Here, H.M. was *involuntarily* transferred out of the district, during the time he was attempting to resolve matters through a conciliation conference process, and, as the State Court of Appeals noted, returned before the matter was even decided by that court. Clearly, more than one agency, and even a former agency, can be responsible for a child's education.

Most significantly, this question involves primarily an interpretation of state law. There is no apparent conflict with federal law because the IDEA specifically leaves this discussion to the states. The H.M. decision upheld H.M.'s right to a hearing as against SSD 1 and so is not in conflict with the IDEA. The Supreme Court should deny review.

IV. The Question Presented, While Important, Needs No Further Interpretation From This Court.

There can be no doubt that questions concerning the provision of education to our

children are important questions. However, as discussed, the question presented is one regarding state law rather than federal law. For the following additional reasons this Court need not review this question.

A. The Minnesota Court of Appeals Decision Supports IDEA's Purpose of Fully Informed Parents.

In addition to cheap and informal conciliation and alternative dispute resolution processes as discussed above, the H.M. decision supports the IDEA's goal of informing parents of their rights with regard to special education services provided pursuant to the IDEA. 20 U.S.C. §1415(b)(1)(D) provides that states must have

> procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section, . . .

This section is an implementation of the purpose of the IDEA stated in 20 U.S.C. §1400(c). The decision in H.M. supports that purpose by notifying districts that they cannot escape their duty to provide FAPE when students are temporarily removed from the district. As explained by the Second Circuit Court of Appeals,

> We do not believe that Congress intended to create a right without a remedy. If, in this case, we do not allow an award of compensatory education, then Clifford's right to an education between the ages of three and twenty-one is illusory. Clifford cannot go back to his previous birthdays to recover and obtain the free education to which he was entitled when he was younger.

Burr v. Ambach, 863 F.2d 1071, 1078 (2nd Cir. 1988), vacated and remanded on other grounds sub nom, Sobol v. Burr, __ U.S. __, 109 S. Ct. 3209 (1989), reaff'd, 888 F.2d 258 (2nd Cir. 1989), cert. denied, __U.S. __, 110 S. Ct. 1298 (1990). Likewise, H.M.'s right to FAPE will be

illusory if he is denied a due process hearing on issues of FAPE before he went to Red Wing. The H.M. Court was correct in remanding the case to a due process hearing. The Court let it be known that school districts cannot escape their duty to provide FAPE when parents are not fully informed of their rights. This decision represents an affirmation of the IDEA's intent to require districts to inform parents and follow due process procedures for the benefit of children with disabilities.

B. The Minnesota Court of Appeals Decision Will Not Result in Any Particularly Great Fiscal Burden on School Districts.

The Petitioner alleges that if the H.M. decision is permitted to stand then school districts across the country will be besieged by due process requests from parents and students who long ago ceased to attend those schools. This is a preposterous scare tactic. There is no evidence to suggest that such an event would occur. Looking at the history of judicial interpretations of the IDEA reveals that such predictions have proven to be mythical. When the Court announced its decision in Burlington that tuition for private schools could be reimbursed in certain instances there was no flood of requests to school districts to pay up. As recently as 1993, the Supreme Court reaffirmed the duty of school districts in Florence when it stated that

> public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.

Florence County Sch. Dist. Four v. Carter, 114 S. Ct. at ___ (1993). By providing FAPE in the first instance schools will not face a large number of due process requests. It has not happened yet and the case is unpublished so it does not lend itself to support claims by others. This

assertion by Petitioner is simply without merit. Even assuming *arguendo* that schools would face an increase in due process requests, it remains the burden of the school districts to provide for these children in the first instance, as Florence County declared, thus avoiding the later liability for failure to do so.

C. The Court Has Already Ruled on the Right to Hearing

Petitioner asserts that the Court should grant certiorari because this is a case of first impression. That is not exactly the case. In Honig v. Doe, 108 S.Ct. 592 (1988) this Court addressed a similar question, whether or not a claim against a school district was moot. The two disabled students in the Honig case had filed suit objecting to exclusion procedures used against them by their respective schools. At the time the case came before the Supreme Court one student, Doe was 24 years old and "no longer entitled to the protections and benefits of the [IDEA], . . ." Id at 601. Therefore, the Court reasoned, the case was moot as to him. The other student, Smith, had moved out of the district but was still in the state. He was still eligible for service under the IDEA because he was 20. Therefore the Court concluded, the case was not moot as to Smith because based upon the state policy, he could be faced with expulsion again in the future, even if living in another district. While Honig did not involve a claim for compensatory education it provides guidance about when a disabled student is entitled to due process from a school district. Smith was permitted to maintain a claim against his former school district because he remained a resident of the state, he remained of eligibility age and it was possible he could be placed in that district again. This Court found that a claim was viable against a former school district even though the student no longer lived in that district. This same theory works with the facts here, because H.M. could, and in fact, did, return to the district,

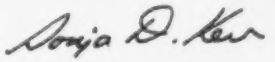
so his due process claim should not have been dismissed. The theory works and there is no need for this Court to revisit the question.

CONCLUSION

The Supreme Court should deny the Petition for Certiorari. The Petitioner fails to meet any basis for granting of certiorari. The state statute has been interpreted by the Minnesota State Court of Appeals consistent with the dictates of the Individuals with Disabilities Education Act. The State of Minnesota has the final word on what is, essentially, a state law question. The State Court of Appeals has ruled and this Court should not intrude on the State's province.

Dated: November 12, 1996

Respectfully submitted,



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2. Letter of October 17, 1996 from Administrative Law Judge Mihalchick Granting a Continuance of the Administrative Hearing.....RA-2

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

October 21, 1996

Ms. Sonja Kerr
5972 Cahill Avenue
Suite 110
Inver Grove Heights, MN 55076

Re: Special School District No. 1
v. H. M.
Application No. A-280 (96-604)

Dear Ms. Kerr:

The application for a stay of the proceedings below in the above-entitled case has been presented to Justice Thomas, who on October 21, 1996 denied the application.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By Cynthia Rapp

Cynthia Rapp
Assistant Clerk

BEST AVAIL

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
100 Washington Square, Suite 1700
100 Washington Avenue South
Minneapolis, Minnesota 55401-2138

October 17, 1996

BY FAX AND MAIL

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RE: In the Matter of H.M. v. Special School District No. 1;
OAH Docket No. 12-2104-9817-3.

Dear Counsel:

This letter is in response to your request in letters of the last several days. I apologize for not responding more quickly, but I was unable to do so.

Ms. Kerr's request to allow Mr. Arthurs to represent the Student and parents at the hearing is granted. There is no requirement under IDEA or Minn. Stat. § 120.17 for representation only by an attorney.

I am also granting the School District's request to reschedule the hearing to a later date and extend the 45-day deadline. The School District has shown good cause for the extension in that Dr. Ortega is unavailable due to a medical emergency in his family. I understand from the School District that he is both an important witness and the coordinator of other witnesses. Therefore, I am extending the commencement date of the hearing to November 19, 1996. I note that Ms. Kerr has suggested that the hearing may last as long as ten days. While I understand that this is a case that now involves a claim for compensatory education, I will not expect the School District to review in detail the services it provided to the Student over a five-year period. I expect to deal only with specific issues the parents identify as inadequacies in the School District's delivery of a free appropriate public education to the Student. I expect that that can be handled in much less than ten days of hearing, but will reserve the entire week of November 18, 1996. If the hearing is conducted as scheduled, the Student and parents can expect a decision by December 13, 1996.

Sincerely,

STEVE M. MIHALCHICK
Administrative Law Judge
Telephone: 612/349-2544

SMM:lc

cc: Phyllis A. Reha
Docket Clerk

ABLE COPY